**S.B.Civil Misc.Appeal No.278/1993**
**Babu Lal & ors. vs. Mohandas & ors.**

Date of Order: 21.7.2006

**HON'BLE MR. PRAKASH TATIA, J.**

Mr. Jitendra Chopra for the appellants.
Mr. O.P. Mehta for the respondent.

Heard learned counsel for the parties.

This appeal is directed against the judgment and decree of the first appellate court dated 30.7.1993 by which the learned first appellate court partly allowed the appeal of the respondents and set aside the judgment and decree of the trial court dated 23.1.1993 passed in Civil Original Suit No.148/78 and remanded the matter back to the trial court to re-frame issue no.1 and thereafter decide the suit afresh after taking evidence on issue no.1.

The learned counsel for the appellants submits that the order of the court below is absolutely perverse because of the reason that the first appellate court merely on the basis of a date mentioned in the issue, which according to the first appellate court could not have been the date of taking possession by defendant nos.1 and 2, remanded the matter to the trial court. It is submitted that the case of the appellants was that the land in question is public chowk and the defendants have no right to deprive the plaintiffs from the benefit of public chowk. The plaintiffs pleaded that on 9.1.1978, the defendant nos.1 and 2 tried to

encroach upon the land and this date was mentioned in issue no.1. The defendants' case was that they are owner of the plot in dispute and, therefore, they have right to enjoy the property right. They denied the land in question to be public chowk. In view of the above, the learned counsel for the appellants submits that the entire material was before the first appellate court and both the parties led their evidence. None of the party claimed that they suffered any prejudice because of ambiguity in the framing of issue no.1 and further more even this was not the plea taken by the respondents-plaintiffs in their memo of appeal.

The learned counsel for the respondents-plaintiffs submits that the issue was not property framed which is apparent from the record for which the first appellate court gave reference of the plea of the parties and, therefore, the order of remand was rightly passed by the court below.

I considered the submissions of the learned counsel for the parties and perused the record of the case as well as the reasons given by the court below.

It appears from the judgment dated 30.7.1993 that the court below failed to apply its mind to the nature of the litigation and, therefore, picked up one date mentioned in issue no.1 to be so important which in fact was not at all much relevant. The plaintiffs' case

in the suit is that the land in question is a public chowk and the defendants are claiming their property right over the plot in dispute. The date was not at all relevant and the court itself could have decided issue no.1 as both the parties led evidence and none of the party claimed that they suffered any prejudice because of framing of issue wrongly.

In view of the above, the appeal deserves to be allowed and hence allowed. The judgment and decree of the first appellate court dated 30.7.1993 is set aside. Both the parties are directed to appear before the first appellate court on 21.8.2006. The first appellate court is directed to decide the appeal within a period of three months thereafter because the appeal was of the year 1993 and the suit was filed in the year 1978. The first appellate court will decide the appeal on merits without influenced by the order dated 30.7.1993 or any observation made herein-above.

( **PRAKASH TATIA ),J.**

mlt.